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No. 03-

IN THE

Supreme Court of the United States

HUNT HEALTH SYSTEMS, LTD.,
P&G ENTERPRISES, INC., MHTJ INVESTMENTS, INC.,
ESPERANZA HEALTH SYSTEMS, LTD.,
AND FRIENDSHIP, INC.,

Petitioners.

v.

RAYMOND H. WECHSLER, Administrative Trustee of the Towers Financial Corporation Administrative Trust, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Plaintiff sued to enforce a factoring contract between defendant Hunt Health Systems Ltd. ("Hunt Health"), a Texas drug and alcohol rehabilitation hospital, and Towers Financial Corp. ("Towers"), one of the largest Ponzi schemes in United States history. Defendants moved for summary judgment arguing that, unknown to Hunt Health, the contract was an integral part of Towers' Ponzi scheme and was, therefore, void on the grounds of public policy. The District Court denied defendants' motion, concluding that defendants' had waived the public policy defense and that assertion of the defense would prejudice plaintiff. Even though the District Court specifically found that defendants had presented evidence raising a genuine issue as to whether or not the contract violated public policy, the District Court held that it would not consider the public policy defense at trial.

On October 15, 2002, defendants filed a petition for writ of mandamus with the United States Court of Appeals for the Second Circuit. Defendants argued that mandamus relief was appropriate because, *inter alia*, (1) the defense of public policy can never be waived and (2) once a court concludes that there is evidence that an agreement violates public policy, it must resolve the public policy issue. Accordingly, defendants requested that the District Court be ordered to resolve the public policy issue at trial, before resolving any other issues. On April 24, 2003, the Second Circuit directed opposing counsel, and invited the District Court, to respond to defendants' petition. On July 2, 2003, the Second Circuit denied defendants' petition, concluding that defendants' petition failed to raise any exceptional circumstances justifying mandamus relief.

The issue before this Court is whether the Second Circuit erred in concluding that defendants' petition for a writ of mandamus should be denied?

LIST OF PARTIES AND RULE 29.6 STATEMENT

The caption of the case contains the names of all the parties to the proceedings before the court of appeals.

Three of the petitioners, P&G Enterprises, Inc., MHTJ Investments, Inc. and Friendship, Inc., are corporate entities. None of the aforementioned petitioners have a parent corporation. There is no publicly held company that owns 10% or more of the stock of any of the aforementioned petitioners.

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OPINIONS BELOW

The opinion of the Court of Appeals denying petitioner's application for a writ of mandamus (Pet. App. A) is unreported. The opinion of the District Court denying petitioner's motion for summary judgment based upon public policy (Pet. App. C) is reported at 216 F. Supp. 2d 347 (S.D.N.Y. 2002).

Additional decisions in the case are reported as follows:

Wechsler v. Hunt Health Systems, Ltd., 1999 WL 397751 (S.D.N.Y. June 16, 1999)

Wechsler v. Hunt Health Systems, Ltd., 1999 WL 672902 (S.D.N.Y. Aug. 27, 1999)

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Wechsler v. Hunt Health Systems, Ltd., 2003 WL 22024043 (S.D.N.Y. Aug. 27, 2003)

STATEMENT OF JURISDICTION

The present application stems from an order issued by the United States Court of Appeals for the Second Circuit entered on July 2, 2003, denying petitioner's application for a writ of mandamus.

Jurisdiction is proper in this Court pursuant to 28 U.S.C. § 1254(1).

STATUTE INVOLVED

This case involves the following provision of the All Writs Act:

28 U.S.C. § 1651 ("Writs")

> (a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

28 U.S.C. § 1651(a).

STATEMENT OF THE CASE

The action underlying this petition was commenced in November 1994 by Alan Cohen, as Chapter 11 Trustee of Towers Financial Corporation ("plaintiff").[1] In his complaint, plaintiff sought damages against defendants for, *inter alia*, the alleged breach of a factoring agreement between defendant Hunt Health and Towers.[2] In January 1995, defendants answered and filed counterclaims. Plaintiff filed his answer to defendants' counterclaims in February 1996.[3]

In July 1998, the parties filed cross-motions for summary judgment. By September 1998, those motions were fully submitted.

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1. Plaintiff, Raymond Wechsler, was the successor Administrative Trustee to Mr. Cohen. Mr. Wechsler is now pursuing this action in his personal capacity.

2. By all accounts, Towers Financial Corporation was one of the largest Ponzi schemes in United States history. *See United States v. Hoffenberg*, 164 F.3d 620, 1998 WL 695933 (2d Cir. Sept. 22, 1998); *United States v. Rosoff*, 242 F.3d 369, 2000 WL 1847105 (2d Cir. Dec. 15, 2000), *cert. denied*, *Brater v. United States*, 532 U.S 1001, 121 S. Ct. 1670, 149 L. Ed. 2d 650 (2001); *Dinsmore v. Squadron, Ellenoff, Plesent, Sheinfeld & Sorkin*, 135 F.3d 837 (2d Cir. 1998). An exhaustive review of the essential context of Towers' criminal enterprise under which the parties to this action entered into their agreement is set forth in the Report and Recommendation of Magistrate Peck to Judge Knapp, *See, e.g., In re Towers Financial Corp. Noteholders Litigation*, 1995 WL 571888 (S.D.N.Y. Sept. 20, 1995) (Peck, M.J.), *report and recommendation adopted*, 936 F. Supp. 126 (S.D.N.Y. 1996) (Knapp, J).

3. The District Court has jurisdiction over the action underlying this petition pursuant to 28 U.S.C. § 1332, governing jurisdiction in diversity cases.

After submission of the parties' first motions for summary judgment, but before the District Court rendered a decision, defendants learned that two principal figures in the Towers Financial Corporation criminal enterprise had been convicted by a jury in the Southern District of New York, Judge Cedarbaum presiding. *See United States v. Mitchell Brater and Michael Rosoff*, 97 CR 336 (MGC) ("*Brater/Rosoff* Trial"). Defendants reviewed the testimony and exhibits of the *Brater/Rosoff* Trial and uncovered admissible evidence of Towers' wrongful purpose in the creation and implementation of its relationship with Hunt Health Systems, Ltd. *See* Defendants' Memorandum Of Law In Support Of Summary Judgment, Mandamus Ex. D.[4]

On June 16, 1999, the District Court issued a decision on the parties' summary judgment motions, among other things, granting plaintiff leave to file an amended complaint to include allegations he argued on summary judgment but had not pleaded.[5] The District Court expressly directed defendants to file an amended answer.[6] *See* Mandamus Ex. J, June Op. at *15 n. 8 ("Plaintiffs amended complaint shall be served and filed by July 12, 1999; and defendants' answer shall be served and filed by July 19, 1999.").

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4. References herein to "Mandamus Ex." are to the exhibits in support of the mandamus petition defendants submitted before the Second Circuit.

5. For a brief synopsis of facts relevant to the underlying action, *see Wechsler v. Hunt Health Systems, Ltd.*, 1999 WL 397751 at *1-*3 (S.D.N.Y. June 16, 1999) ("June Op."), Mandamus Ex. J.

6. As such defendants did not, as the District Court states, file their amended answer "without seeking leave of the court." *See Wechsler v. Hunt Health Systems, Ltd.*, 216 F. Supp. 2d 347, 349 (S.D.N.Y. 2002) ("Aug. Op."), Pet. App. at 8a.

Plaintiff then recast and rewrote his entire complaint to include contested factual allegations and new claims for breach of the parties' agreement, not included in his original pleading. Based upon the facts as discovered through the *Brater/Rosoff* Trial and in response to plaintiff's amended complaint, defendants amended their answer to include affirmative defenses relating to the ability of Towers to enforce the contract.[7]

In August 1999, plaintiff filed a motion to strike and dismiss defendants' amended answer. Defendants opposed this motion on its merits and, in addition, filed a motion to amend *nunc pro tunc* and to conduct limited further discovery of three individuals in connection with the *Brater/Rosoff* Trial. Before the motions were submitted, plaintiff acquired new counsel, the Boston firm, Gadsby & Hannah, LLP.[8] The motions were fully submitted in November 1999.

In December 1999, with three motions already pending and "over the strenuous objections of defense counsel, [the District Court] granted plaintiff leave to renew his motion for partial summary judgment so that plaintiff's new lawyers would not be 'straightjacketed' by the previous work of their predecessors," Willkie Farr and Gallagher. *See Wechsler v. Hunt Health Systems,*

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7. According to the District Court, "[t]he [Brater/Rosoff] trial involved the prosecution of former Towers officers who were engaged in an illegal Ponzi scheme for which they relied on the accounts receivable Towers purchased from its health care clients, including Hunt Health." *Wechsler v. Hunt Health Systems, Ltd.*, 186 F. Supp. 2d 402, 416 (S.D.N.Y. 2002) ("Feb. Op."), Mandamus Ex. K.

8. Gadsby & Hannah previously represented Mr. Wechsler as Towers' bankruptcy trustee in the Massachusetts action entitled *Wecshler v. Long Island Rehabilitation Center of Nassau, Inc.*, 93 CV 6946B. (Mass. Super.). *See Wechsler v. Long Island Rehabilitation Center of Nassau, Inc.*, 1996 WL 590679 (Mass. Super. Sept. 4, 1996).

Ltd., 198 F. Supp. 2d 508, 515 (S.D.N.Y 2002) ("April Op."), Mandamus Ex. L. In April 2000, plaintiff submitted a second motion for summary judgment.[9]

In February 2002, the District Court issued a decision on three of the six pending motions. In its opinion, the District Court construed defendants' amended answer as an effort by defendants to switch theories of the case from contract to fraud, and struck a majority of defendants' affirmative defenses, concluding that "such a radical shift in gears would be unduly prejudicial to plaintiff."[10] *See* Mandamus Ex. K, Feb. Op. at 418. The District Court reached its conclusion after noting that the permissible scope of an amended answer in response to an amended complaint is an open question in the Second Circuit.[11] The District Court noted that its decision was based upon prejudice and delay, not upon the merits of any of defendants' claims. *See Id.* at p. 419 n. 9; Pet. App. at 14a-15a, Aug. Op. at 352 ("[T]he Court did not reach the merits of defendants' illegality and fraud defenses and theories" in its February 2002 decision.).

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9. Plaintiff's renewed motion for partial summary judgment occasioned motions to strike filed by each side in the litigation.

10. Included in defendants' amended answer was the affirmative defense of public policy. However, that defense was focused upon specifically by neither the parties in their submissions nor the District Court in its February Decision.

11. As the District Court recognized, "the Second Circuit has not squarely addressed the precise issue in this case, namely the permissible scope of a supplemental answer in response to a supplemental complaint." Mandamus Ex. K, Feb. Op. at 417. Indeed, in *Pereira v. Cogan*, 2002 WL 1822928 (S.D.N.Y. August 7, 2002), Judge Sweet stated that such cases are "all over the map" and in particular, criticized the holding of "Wechsler-type" cases as presenting "too narrow a view of what 'responsive' answers may be."

In April 2002, the District Court decided the last of the pending motions before it, which were filed in April 2000. The District Court directed the parties to appear for conference on May 6, 2002.

On May 1, 2002, counsel for defendants wrote to the District Court to inform it of defendants' desire to file a renewed motion for summary judgment based upon public policy. In that letter, defendants' counsel outlined state and federal law on the issue of public policy and reminded the District Court of its duty to resolve the public policy issue on its merits. *See* Banker Letter 5/1/02, Mandamus Ex. B. At the May 6, 2002 conference, the parties agreed to an expedited briefing schedule for defendants' motion.

On June 28, 2002, defendants submitted their motion for summary judgment based upon public policy. Drawing upon the *Brater/Rosoff* trial and other evidence obtained without the assistance of plaintiff, defendants documented the extent to which the wrongful purpose of Towers' criminal enterprise encompassed and dominated the relationship between the parties, and detailed the obligation of the District Court to resolve the public policy issue in the interests of justice. *See* Mandamus Exs. D, F (Local Rule 56.1 Statement and Counter-Statement), and G (Defendants' Reply Memorandum of Law). Plaintiff responded with no evidence or law disputing defendants' motion and conceded admissions made in other Towers proceedings concerning Towers' wrongful purpose. *See* Plaintiff's Opposition to Defendants' Motion For Summary Judgment, Mandamus Ex. E. Plaintiff then filed a motion for sanctions.

On August 27, 2002, the District Court, *inter alia*, denied defendants' summary judgment motion and granted plaintiff's sanctions motion. The District Court found that an issue of fact

exists concerning defendants' public policy defense, but ruled that defendants' motion was procedurally unsound because the public policy defense could be waived and had been waived.

On October 11, 2002, defendants filed a petition for a writ of mandamus with the Second Circuit requesting, *inter alia*, that the District Court be required to resolve the public policy defense at trial.[12] On April 24, 2003, the Second Circuit ordered opposing counsel, and invited the District Court, to respond. The District Court submitted its response on May 14, 2003. Therein, the District Court cited no additional law supporting its August opinion.

On July 2, 2003, the Second Circuit denied defendants' petition for mandamus based on its finding that the petition failed to raise an extraordinary circumstance justifying issuance of the writ.

On May 14, 2003, pursuant to an order of the District Court, the parties submitted their proposed joint pre-trial order. Over the objection of defendants, on September 22, 2003, the District Court ordered that the trial in this matter will commence on or about October 20, 2003.[13]

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12. Jurisdiction in the Court of Appeals is proper under 28 U.S.C. § 1651, in that defendants' petition before that court sought a writ of mandamus.

13. Defendants' objection was based upon the severe hardship the October 20, 2003 trial date will inflict upon one of Hunt Health's principals, a primary witness for defendants residing in Texas, who cannot arrange for the twenty-four hour care of her elderly and severely disabled husband for the two to three weeks required for trial on short notice.

SUMMARY OF ARGUMENT

The District Court explicitly concluded that there is a genuine issue of material fact as to whether the contract plaintiff seeks to enforce violates public policy. Ignoring a century of precedent, however, the District Court also decided that it will not resolve the public policy issue at trial because the defense of public policy would prejudice plaintiff. The District Court's ruling constitutes a clear and indisputable abuse of discretion that the Second Circuit, upon defendants' application for a writ of mandamus, was required to redress.

Once a court becomes aware that public policy considerations may taint a contract before it, the court must resolve the public policy issue, even *sua sponte*, to ensure that the judicial system does not lend its sanction to a wrong. The law is plain – the defense of public policy is never waived.

Here, the District Court's refusal to resolve the public policy question in the face of an unavoidable duty to do so presents a clear-cut case for mandamus. The District Court's ruling that the defense of public policy can be, and has been, waived is an aberration among all reported decisions. The integrity of the judicial system and the rights of defendants require that the issue of public policy be conclusively resolved before the District Court determines whether the contract at issue is otherwise enforceable. Accordingly, only an immediate writ of mandamus compelling the District Court to resolve the issue of public policy at trial will provide adequate relief.

Because the Second Circuit has refused to take action in the face of defendants' clear and indisputable rights, only an order from this Court granting defendants' the full measure of relief requested can assure the due administration of justice in the present case.

ARGUMENT

A writ of mandamus is utilized "'to confine an inferior court to a lawful exercise of its prescribed jurisdiction, or to compel it to exercise its authority when it is its duty to do so.'" *Mallard v. U.S. Dist. Court for Southern Dist. of Iowa*, 490 U.S. 296, 308, 109 S. Ct. 1814, 1822, 104 L. Ed. 2d 318 (1989) (quoting *Roche v. Evaporated Milk Assn.*, 319 U.S. 21, 26, 63 S. Ct. 938, 941, 87 L. Ed. 1185 (1943) (additional citations omitted).[14] Issuance of the writ is appropriate "when there is 'usurpation of judicial power' or a clear abuse of discretion." *Schlagenhauf v. Holder*, 379 U.S. 104, 110, 85 S. Ct. 234, 238, 13 L. Ed. 2d 152 (1964) (citation omitted); *Carribean Trading & Fidelity Corp., v. Nigerian Nat'l Petroleum Corp.*, 948 F.2d 111, 115 (2d Cir. 1991), *cert. denied*, 504 U.S. 910, 112 S. Ct. 1941, 118 L. Ed. 2d 547 (1992) (same).

Mandamus will be granted where (1) the petitioner has demonstrated that its right to such relief is "'clear and indisputable'" and (2) where the petitioner has "no other adequate means to attain the relief he desires." *Allied Chemical Corp. v. Daiflon, Inc.*, 449 U.S. 33, 35-36, 101 S. Ct. 188, 190, 66 L. Ed. 2d 193 (1980) (citations omitted). Both of these requirements are satisfied here.

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14. *See In re F.C.C.*, 217 F.3d 125, 133 (2d Cir.) (Mandamus is available to "forc[e] an inferior court to take an obligatory action."), *cert. denied, Next Wave Personal Communications, Inc. v. F.C.C.*, 531 U.S. 1029, 1215 S. Ct. 606, 148 L. Ed. 2d 518 (2000); *Sierra Rutile Ltd. v. Katz*, 937 F.2d 743, 749 (2d Cir. 1991) ("In fact, one of the clearest traditional uses of mandamus is to compel a court to act when it had no power to refuse [to act].") (citation and internal quotation marks omitted) (alteration in original).

I. PETITIONER'S RIGHT TO MANDAMUS RELIEF IS CLEAR AND INDISPUTABLE

Although it believed it was not compelled to do so, in its August opinion, the District Court specifically addressed what it referred to as the "substance" of defendants' summary judgment submission. *See* Pet. App. at 16a-22a, Aug. Op. at 353-56. After reviewing the evidence and "[d]rawing all reasonable inferences in plaintiff's favor," the District Court concluded, not that defendants' public policy challenge was futile, but that "there remains a genuine issue of material fact with regard to a public policy defense." *Id.* at 22a, Aug. Op. at 356. Despite this conclusion, the District Court ruled that it would not consider the public policy issue at trial because defendants had waived the defense. *Id.*, Aug. Op. at 356.

The implications of the District Court's ruling are compelling. The District Court has held that even though, on the facts and on the law, there is a genuine issue as to whether a contract violates public policy, the Court will enforce the contract as if the public policy issue does not exist due to defects in pleading. This ruling goes against every reported decision on the matter and places the integrity of the judicial system at risk.

Having recognized an important public policy question, the District Court has a duty to resolve the issue before burdening the system or the defendants with consideration of whether or not the contract at hand is otherwise enforceable by plaintiff. Given the District Court's refusal to fulfill its obligation, the Second Circuit has a duty to compel the District Court to action by granting defendants' mandamus petition.

A. The District Court Must Resolve The Public Policy Issue Before Enforcing The Contract

There is "no doubt that illegal promises will not be enforced" by federal courts. *Kaiser Steel Corp. v. Mullins*, 455 U.S. 72, 77, 102 S. Ct. 851, 856, 70 L. Ed. 2d 833 (1982); *McMullen v. Hoffman*, 174 U.S. 639, 670, 19 S. Ct. 839, 851, 43 L. Ed. 1117 (1899) ("Being of the opinion that the contract proved in this case was illegal, in the sense that it was fraudulent, and entered into for improper purposes, the law will leave the parties as it finds them."); *see United States v. Bonanno Organized Crime Family of La Cosa Nostra*, 879 F.2d 20, 28 (2d Cir. 1989) ("Under both federal and state law, illegal agreements, as well as agreements contrary to public policy, have long been held to be unenforceable and void."); *In re Independent Clearing House Co.*, 77 B.R. 843, 858 (D. Utah 1987) ("For a court to lend its aid to a wrongdoing plaintiff is to lend its sanction to the wrong."); *Walters v. Fullwood*, 675 F. Supp. 155, 160 (S.D.N.Y. 1987) (no court should be required to serve as "paymaster of the wages of crime"); *Nomura Securities, Int'l v. E*Trade Securities, Inc.*, 2003 WL 22058235 at *14 (S.D.N.Y. Sept. 4, 2003) ("if the contract is opposed to the interests of the public, the agreement is void").

This mandate against enforcement has developed "not for the benefit of the defendant, but because public policy demands that [the court's aid] should be denied without regard to the interests of individual parties."[15] *Kaiser Steel Corp.*, 455 U.S.

15. The District Court provides absolutely no support for its statement that the "paramount concern" in cases involving questions of public policy is "the risk of generating a windfall for the moving party." Pet. App. at 19a, Aug. Op. at 354. As the cases cited in the text demonstrate, public policy is designed to serve the interests of justice, not the interests of the parties.

at 77-78, 102 S. Ct. at 856 (citation and internal quotation marks omitted); *N.L.R.B. v. Local 46, Metallic Lathers Union and Reinforcing Iron Workers of New York and Vicinity of the Intern. Ass'n of Structural and Ornamental Iron Workers*, 149 F.3d 93, 108 (2d Cir. 1998) (same); *Beasley v. Texas & P. Ry. Co.*, 191 U.S. 492, 498, 24 S. Ct. 164, 166, 48 L. Ed. 274 (1903) ([T]he very meaning of public policy is the interest of others than the parties, and that interest is not to be at the mercy of the defendant alone.") (citing *Northern P. R. Co. v. Washington*, 142 U.S. 492, 509, 35 L. Ed. 1092, 12 Sup. Ct. Rep. 283 (1892)); *Bateman Eichler, Hill Ricjards, Inc. v. Berner*, 472 U.S. 299, 306 n.12, 105 S. Ct. 2622, 2626 n.12, 86 L. Ed. 2d 215 (1985)

> The objection, that a contract is immoral or illegal as between plaintiff and defendant, sounds at all times very ill in the mouth of the defendant. It is not for his sake, however, that the objection is ever allowed. . . . The principle of public policy is this: *ex dolo malo non oritur* [out of fraud no action arises]. . . . It is upon that ground the Court goes; not for the sake of the defendant, but because they will not lend their aid to such a plaintiff.

(quoting in parenthetical *Holman v. Johnson*, 1 Cowp. 341, 343, 98 Eng. Rep. 1120, 1121 (K.B. 1775)) (alterations in original); *Kaiser-Frazer Corp. v. Otis & Co.*, 195 F.2d 838, 843-44 (2d Cir.)

> [I] it is clear that a contract which violates the laws of the United States and contravenes the public policy as expressed in those laws is unenforceable. . . . This is so regardless of the equities as between the parties for "* * * the very meaning of public policy is the interest of other than

> the parties and that interest is not to be at the mercy of the defendant alone.")

(footnote and citations omitted), *cert. denied*, 344 U.S. 856, 73 S. Ct. 89, 97 L. Ed. 664 (1952); *Ful-Vue Sales Co. v. American Optical Co.*, 118 F. Supp. 517, 529 (S.D.N.Y. 1953) (same); *Roberts v. Criss*, 266 F. 296, 301 (2d Cir. 1920) ("The defense of illegality may be set up, not as a protection to defendant, but as a disability in the Plaintiff.").

In the present case, the District Court made a specific finding that the promise at issue may violate public policy. As such, the District Court has the unavoidable duty to conclusively determine the public policy issue before that promise can be enforced.[16] *See, e.g.*, *Kaiser Steel Corp.*, 455 U.S. at 77, 102 S. Ct. at 856 ("The authorities from the earliest time to the present unanimously hold that no court will lend its assistance in any way towards carrying out the terms of an illegal contract.") (citation and internal quotation marks omitted); Pet. App. at 18a, Aug. Op. at 354 ("'Where the enforcement of private agreements would be violative of [public] policy it is the obligation of courts to refrain from such exertions of judicial power.'") (quoting *Kaiser Steel Corp.*, 455 U.S. at 83-84, 102 S. Ct. at 859-60); *Oscanyan v. Arms Co.*, 103 U.S. 261, 267, 26 L. Ed. 539, 542 (1880) (public policy objection is one "which the court itself [is] bound to raise in the interest of the due administration of justice"); *Lee v. Johnson*, 116 U.S. 48, 52, 6 S. Ct. 249, 251 (1885) (same); *Roberts*, 266 F. at 302-03

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16. As the cases cited *infra* in the text indicate, a public policy defense cannot be waived, even voluntarily, by a party. Thus, even though defendants previously made what the District Court deemed "binding admissions . . . concerning the validity of the HCP Agreement," *see* Pet. App. 13a, Aug. Op. at 352, the District Court must now resolve the public policy issue given its conclusion that the true facts may prove otherwise.

(same); *Noonan v. Gilbert*, 63 App.D.C. 30, 31, 68 F.2d 775, 776 (D.C. Cir. 1934) ("a court in the due administration of justice is bound to refuse its aid to enforce a contract that offends public policy"); *Sheffield Commercial Corp. v. Clemente*, 792 F.2d 282, 286 (2d Cir. 1986) ("court has duty to raise [public policy] issues sua sponte") (citing *California Pacific Bank v. Small Business Admin.*, 557 F.2d 218, 223 (9th Cir. 1977)); *Sagmel, Inc. v. Firebird Int'l Inc.*, 1995 WL 39460 at *3 (N.D. Ca. Jan. 31, 1995) (same); *Marock Intern., Inc. v. Brinkmann Corp.*, 1993 WL 349684 at *4 (S.D.N.Y. Sept. 13, 1993)

> Where a violation of public policy may be involved, courts may raise the issue *sua sponte* to assure that their authority is not abused. When the authority of a court is invoked, the court has a duty to assure that its powers are not employed in the service of objectives contrary to law or to any legally recognized public interest.

Insurance Co. of Am. v. S/S Cape Charles, 1994 WL 263592 at *2 (S.D.N.Y. June 3, 1994) (public policy challenge presents a "barrier" to recovery "'which the court itself [is] bound to raise in the interests of the due administration of justice'") (quoting *Nyhus v. Travel Management Corp.*, 466 F.2d 440, 447 (D.C. Cir. 1972)), *aff'd* 122 F.3d 1056 (2d Cir. 1995).

The District Court's refusal to take the obligatory action of resolving the public policy issue at trial, therefore, constituted a clear abuse of diseretion which the Second Circuit was required to redress. *Cf. McLee v. Chrysler Corp.*, 38 F.3d 67, 68 (2d Cir. 1994) (Mandamus appropriate where "[a] District Judge has declined to exercise decision-making authority entrusted to him, even after precedents obliging him to exercise such authority have been called to his attention.").

B. The Public Policy Defense Cannot Be Waived

The District Court abdicated its duty to resolve the public policy issue at trial because it concluded that defendants had waived the public policy defense. *See* Pet. App. at 22a, Aug. Op. at 356. No plausible reading of the authorities on the matter justifies the District Court's actions.

A public policy challenge to the enforceability of a contract cannot be waived. *Oscanyan*, 103 U.S. at 267, 26 L. Ed. at 542; *Lee*, 116 U.S. at 51-53, 6 S. Ct. at 250-51; *Beasley*, 191 U.S. at 498, 24 S. Ct. at 166 (Public policy "interest is not to be at the mercy of the defendant alone.") (citing *Northern P. R. Co.*, 142 U.S. at 509); *Wallace Oil Co., Inc. v. Michaels*, 839 F. Supp. 1041, 1045 (S.D.N.Y. 1993) ("Once a case is brought in the federal courts, the parties can no longer restrict the issues considered, even if the opposing party chooses to ignore some, if they might bar grant of the relief requested for reasons relevant to public policy.") (citing *Shelley v. Kraemer*, 334 U.S. 1, 68 S. Ct. 836, 92 L. Ed. 1161 (1948) (other citations omitted)); *see also, e.g.*, *Roberts*, 266 F. at 302-03; *Nyhus*, 466 F.2d at 447, 151 U.S.App.D.C. at 276; *Kaiser-Frazer Corp.*, 195 F.2d at 843-44; *Kidder, Peabody & Co. v. IAG Int'l Acceptance Group*, 1999 WL 11553 at *13 (S.D.N.Y. Jan. 13, 1999); *General Star Indem. Co. v. Platinum Indem. Ltd*, 2001 WL 883649 at *2 (S.D.N.Y. Aug. 7, 2001); *Insurance Co. of Am.*, 1994 WL 263592 at *2; *Pharmaceutical Sales and Consulting Corp. v. J.W.S. Delavau Co., Inc.*, 106 F. Supp. 2d 761, 767-68 (D.N.J. 2000); *I.U.B.A.C. Local Union No. 31 v. Anastasi Bros. Corp.*, 600 F. Supp. 92, 95 (S.D. Fla. 1984); *Sagmel, Inc.*, 1995 WL 39460 at *3; *Ful-Vue Sales Co.*, 118 F. Supp. at 529.

In its August opinion, the District Court rejected this manifest rule of law on the sole basis that, in each case cited by

defendants, "the court permitted the party to assert the [public policy] defense only after deciding that the plaintiff would not be prejudiced thereby." *See* Pet. App. at 16a, Aug. Op. at 353. The District Court's reading of the cases is erroneous. All of the decisions relied upon by defendants turned on the unique nature of the public policy defense and the interests it serves. In no instance did the cited ruling hinge on a preliminary finding that allowing the public policy defense would not prejudice the opposing party.[17]

Focus on the unique nature of the public policy defense, as opposed to prejudice, is not only supported by the plain language of the case law, but is also in line with this Court's precedent concerning, generally, the right to amend.

> In the absence of any apparent or declared reason – such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure

17. The District Court notes that this case was filed "nearly eight years ago." Pet. App. at 12a, Aug. Op. at 351. While the District Court is correct in this assertion, the District Court fails to note that nearly four of those eight years have been spent waiting for the Court to issue decisions on the motions of the parties, beginning with the parties' 1998 motions for summary judgment. For example, the District Court took over two years to decide plaintiff's motion to strike defendants' amended answer and over two and a half years to decide defendants' motion for reconsideration. Therefore, to the extent the District Court would justify its finding of waiver on a theory of undue delay, that justification is not only legally, but also factually, inaccurate. *Cf. Richardson v. Greenshields Securities, Inc.*, 825 F.2d 647 (2d Cir. 1987) (refusal of court to exercise its duty to decide motion constitutes a usurpation of power); *U.S. East Telecommunications, Inc. v. United States*, 15 F.3d 261, 263 (2d Cir. 1994) ("A Court confronted by a motion authorized by the Rules must decide the motion within a reasonable time. . . . [T]he right of a movant to have a motion decided is so clear that it will be enforced under proper circumstances by mandamus.") (footnote and citations omitted).

> deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc. – the leave sought should, as the rules require, be "freely given."

Foman v. Davis, 371 U.S. 178, 182, 83 S. Ct. 227, 230, 9 L. Ed. 2d 222 (1962); *see Church of Scientology Intern. v. Time Warner, Inc.*, 1998 WL 575194 at *3 (S.D.N.Y. Sept. 9, 1998.) (Leisure, J.) (quoting *Block v. First Blood Associates*, 988 F.2d 344, 350 (2d Cir. 1993)) (same), *aff'd*, 238 F.3d 168 (2d Cir.), *cert. denied*, 534 U.S. 814, 122 S. Ct. 40, 151 L. Ed. 2d 13 (2001). This rule applies even if an affirmative defense is raised for the first time in a motion for summary judgment. *United States v. Big Apple Indus. Bldgs., Inc.*, 1993 WL 437787 at *6 (S.D.N.Y. Oct 26, 1993) (Leisure, J.) (citing *Block*, 9[8]8 F.2d at 350; *State Teachers Retirement Bd. v. Fluor Corp.*, 654 F.2d 843, 856 (2d Cir. 1981)).

If, as the District Court concluded, public policy can be waived due to prejudice, then public policy is no different than any other affirmative defense and the numerous decisions explicitly stating that, unlike other affirmative defenses, public policy cannot be waived ring hollow. *See, e.g., Sheffield Commercial Corp.*, 792 F.2d at 286 ("Traditional doctrines of waiver do not bar courts from considering whether a contract is illegal or violates statutory requirements designed to protect the general public."); *Kidder, Peabody & Co.*, 1999 WL 11553 at *13 ("However, while waiver is often the consequence for failure to plead most affirmative defenses, an affirmative defense alleging that a contract is illegal and should not be enforced on public policy grounds presents an exception to that general rule, as a number of courts have recognized.") (citing cases); *Insurance Co. of Am.*, 1994 WL 263592 at *2 ("The rule that

failure to plead an affirmative defense may result in waiver of that defense , . . does not apply to illegality of contract.") (citations omitted); *General Star Indem. Co.*, 2001 WL 883649 at *2

> Importantly, the affirmative defense which plaintiff seeks to raise should not be unforeseeable to any plaintiff or counter-plaintiff in a contractual dispute, even if the opposition fails to assert illegality in its reply. Generally, failure to plead an affirmative defense constitutes a waiver of that defense, but an affirmative defense alleging that a contract is illegal and should not be enforced on public policy grounds presents an exception to that rule.

(citations and internal quotation marks omitted); *Fieger v. Pitney Bowes Credit Corp.*, 2002 WL 31082955 at *7-*8 (S.D.N.Y. Sept. 17, 2002) ("under both federal and New York law, it is not absolutely necessary to plead the illegality of a contract which is also contrary to public policy") (citations and internal quotation marks omitted).

To date, neither the parties, nor the District Court, nor the Second Circuit have ever uncovered any case in which it was held that public policy could be waived if assertion of the defense would be prejudicial to the nonmovant.[18] To the contrary, in

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18. In the brief he filed before the Second Circuit in opposition to defendants' petition for mandamus, plaintiff cited a district court decision, *Peralta Carriers Corp. v. Westvaco Corp.*, 1989 WL 433172 (S.D.N.Y. June 21, 1989), for the proposition that defendants' right to mandamus relief was not "clear and unmistakable." *See* Brief of Raymond Wechsler in Opposition to Mandamus ("Pl.'s Mandamus Br.") at pp. 20-21. Contrary to plaintiff's assertions, however, *Peralta*, has no application

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line with the mandates of this Court's rulings on the matter, the decision of every court that has considered the issue indicate that public policy can never be waived.[19] Accordingly, the District Court cannot rely on a theory of waiver to avoid its obligation to resolve the public policy issue at trial.[20]

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here. In *Peralta*, the court granted plaintiff's motion to preclude the defendant from asserting a defense of illegality. Unlike public policy, the defense of illegality is an affirmative defense specifically enumerated under Fed. R. Civ. P. 8(c). Moreover, the *Peralta* court's decision was based upon general principles of waiver not applicable here and did not address any of the cases or issues discussed herein.

19. As the Second Circuit has itself recognized, the public policy defense will be considered even if raised for the first time on appeal. *See Sheffield Commercial Corp.*, 792 F.2d at 286; *Cohen v. West Haven Bd. of Police Com'rs*, 638 F.2d 496, 500 n.6 (2d Cir. 1980); *In re Dinova*, 212 B.R. 437, 446 n.5 (2d Cir. Bankr. App. Panel 1997).

20. To the extent the District Court believed its August 2002 decision on the waiver issue was constrained by its February 2002 ruling that plaintiff would be prejudiced by the public policy defense, the Court was mistaken. *See* Pet. App. at 16a, Aug. Op. at 353 ("Because the Court has already held, in denying the motion to amend . . . that plaintiff will be prejudiced [by the public policy defense] . . . the Court finds that defendants have waived this defense and the present motion is procedurally improper.").

First, because the District Court's February 2002 ruling, at least to the extent it denied defendants leave to amend their answer to add the public policy defense, constituted "clear error," the law of the case doctrine should have been ignored. *See Virgin Atlantic Airways, Ltd v. National Mediation Board*, 956 F.2d 1245, 1255 (2d Cir), *cert. denied*, 506 U.S. 820, 113 S. Ct. 67, 121 L. Ed. 2d 34 (1992); *see also* Pet. App. at 23a, Aug. Op. at 356 n. 9 ("law of the case doctrine counsels against

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II. PETITIONER HAS NO OTHER ADEQUATE MEANS TO OBTAIN THE DESIRED RELIEF

"Generally, mandamus is appropriate only where no other remedy adequately protects the petitioner's interest." *In re F.C.C.*, 217 F.3d at 133-34 (citation omitted); *see also, e.g., In re Austrian, German Holocaust Litigation*, 250 F.3d at 162 (A writ of mandamus "normally is not to be granted if the relief sought could be obtained by means of a direct appeal.") (citing *Helstoski v. Meanor*, 442 U.S. 500, 505-08, 99 S. Ct. 2445, 61 L. Ed. 2d 30 (1979); *Kerr v. United States District Court*, 426 U.S. 394, 403, 96 S. Ct. 2119, 48 L. Ed. 2d 725 (1976)). Such is the case here.

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re-opening issues absent compelling circumstances, such as . . . the need to correct a clear error") (citing *Wilder v. Bernstein*, 645 F. Supp. 1292, 1310 (S.D.N.Y. 1986), *aff'd*, 848 F.2d 1338 (2d Cir. 1988)).

Second, the District Court's February 2002 conclusion that plaintiff will be prejudiced by the public policy defense is of no moment, because the public policy defense can be asserted at any time regardless of prejudice and regardless of the state of the pleadings. *See* text, *supra*; *see also Beasley*, 191 U.S. at 498, 24 S. Ct. at 166 (Once recognized, a public policy defense must be considered "whatever the pleadings."); *Roberts*, 266 F. at 302-03 ("The fact that the illegality of the agreement was not pleaded is of no moment.") (citing *Oscanyan*, 103 U.S. at 267, 26 L. Ed. at 542); *Lee*, 116 U.S. at 51-53, 6 S. Ct. at 250-51 (same); *United States v. Krieger*, 773 F. Supp. 580, 583 (S.D.N.Y. 1991) ("[T]he court may, *sua sponte*, 'step in and deny the right to any relief [under an agreement] without reference to the state of the pleadings, whenever it becomes apparent that the agreement is antagonistic to the interest of the public.'") (emphasis and second alteration in original) (citation omitted); 15 Corbin on Contracts § 1533 at p. 719 (When public policy requires non-enforcement and refusal of remedy "no court will fail to act in accordance with it on the mere ground that illegality was not pleaded.").

In a decision published in the official federal reporter, the District Court explicitly determined that there is a genuine issue of material fact as to whether the contract in question violates public policy. Absent the issuance of mandamus by the Second Circuit, however, the District Court will ignore over one-hundred years of this Court's clear and binding precedent and proceed to trial on the merits of plaintiff's contract action feigning that the public policy issue does not exist. Neither the judicial system nor the defendants may properly be subjected to such an unseemly exercise. *See* decisions cited *supra*.

A direct appeal after final judgment will not afford adequate relief. Even if it is ultimately determined on such an appeal that the District Court abdicated its duty to resolve the public policy issue, at that point, the damage will already have been done.[21] The judicial system's integrity will have already been tarnished by the District Court's willingness to enforce a contract it knows may violate public policy and its resources will have already been wasted on a trial. The Second Circuit's decision that such a result does not raise an exceptional circumstance justifying mandamus compounds the ill-effects of the District Court's error.[22] Similarly, on appeal, the right of defendants to have the

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21. *See United States v. International Broth. of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO*, 907 F.2d 277, 280 (2d Cir. 1990) ("*Where an alternative procedure is available, however, 'exceptional circumstances' which 'show clearly the inadequacy' of that alternative procedure may still justify issuing the writ*") (emphasis added) (citation omitted)

22. *Cf. United States v. Balistrieri*, 779 F.2d 1191, 1205 (7th Cir. 1985)

> *To require a timely petition for a writ of mandamus as the sole remedy serves another important purpose: that of*
>
> (Cont'd)

public policy issue resolved before having to defend against plaintiff's underlying contract claim will already have been abrogated.[23]

The public policy issue must, accordingly, be resolved first. *See, e.g., Kaiser Steel Corp.*, 455 U.S. at 83, 102 S. Ct. at 859 ("[A] federal court has a duty to determine whether a contract violates federal law before enforcing it."). The Second Circuit, therefore, has a duty to issue mandamus here.

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> *preventing injury to the public perception of the judicial system before it has a chance to occur.* If a party is deprived of his substantial rights in a trial before an actually biased judge, the harm can be remedied (though not costlessly) by a new trial before an unbiased judge. But the harm to the public's perception of the judicial system when a judge who appears to be biased proceeds in a case is more difficult to correct. Prevention in such circumstances is clearly preferable to attempts to cure.

(Emphasis added), *cert. denied, DiSalvo v. United States*, 475 U.S. 1095, 106 S. Ct. 1490, 89 L. Ed. 2d 892 (1986); *Union Carbide Corp. v. U.S. Cutting Service, Inc.*, 782 F.2d 710, 713 (7th Cir. 1986) (same).

23. As plaintiff conceded in his opposition to defendants' mandamus petition, issuance of a writ of mandamus is "appropriate if the ordinary appeals process would deprive the petitioner of the right it claims." Pl.'s Mandamus Br. at p. 12 (citing *In re F.C.C.*, 217 F.3d at 134).

CONCLUSION

Upon the foregoing, petitioners respectfully request that this Court grant certiorari in the present case.

Respectfully submitted,

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